

**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF SAFETY**

IN THE MATTER OF:

TENNESSEE DEPARTMENT OF SAFETY,

v.

\$17,300.00 in U.S. Currency

**Seized from: Angelia and Arsenio Zelaya,
and Luis Alas**

Date of Seizure: February 19, 2006

**Claimants: Angelia and Aresio Zelaya, and
Luis Alas**

**DOCKET NO: 19.01-092088J
(D.O.S. Case No. F0189)**

INITIAL ORDER

This contested case was heard in Knoxville, Tennessee, on March 5, 2007, before Robert Fellman, Administrative Law Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Lori Long, staff attorney for the Tennessee Department of Safety, represented the State. Angelia Zelaya, Arsenio Zelaya, and Luis Alas, Claimants, were represented by Jonathon Cooper of the Knoxville bar.

At issue was the proposed forfeiture of \$17,300.00 for its alleged use in violation of T.C.A. §53-11-201 et. seq., §40-33-201 et seq., and §53-11-451. This matter became ready for consideration on April 24, 2007, when the hearing transcript was filed in this office.

After consideration of the record in this matter, it is determined that the **money** at issue should **be returned to Claimants**. This determination is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 19, 2006, Vanore, Tennessee, Police Officer Bill Robins made a routine traffic stop of a truck driven by Arsenio Zelaya. Luis Alas, Mr. Zelaya's brother, was riding in the truck as a passenger.

2. Both men were patted down. Seventeen thousand, three hundred dollars was found on Mr. Alas. The money was in two ATM bank envelopes, packaged in \$100 bills, in two different pockets of Mr. Alas.

3. Although Mr. Zelaya speaks only broken English and Mr. Alas practically no English, Officer Robins understood Mr. Zelaya to tell him that the money was all his and Mr. Alas was holding it for him. He testified at the hearing that he found that suspicious as there was no reason Mr. Zelaya could not have carried his own money.

4. According to Oficer Robins' testimony, Mr. Zelaya told him that he (Mr. Zelaya) was going to wire the money to Mr. Alas' daughter for the purchase of a house.

5. Officer Robins asked Mr. Zelaya if he could search the truck. Mr. Zelaya said yes. No drugs were found.

6. A K-9 officer, Conway Mason, and his dog were called to the scene. The dog alerted to the money, the passenger door area and behind the passenger seat. The dog was trained to alert to marijuana, cocaine, methamphetamines, and heroin.

7. According to the testimony at the hearing of K-9 Officer Conway Mason, his dog has been trained not to alert to drug smells over three hours old.

8. Officer Mason testified that the majority of money in the United States has been exposed to narcotics. He also stated that the smell of marijuana and cocaine dissipate more slowly in an envelope.

9. The money was later tested for drugs and \$9,000 tested positive for cocaine, heroine, marijuana and methamphetamines.

10. The truck was also tested and the floorboard behind the passenger seat tested positive for a trace of methamphetamines.

11. Mr. Zelaya is a mason. He makes about \$40,000 a year. He was driving the truck the day of the seizure to a Western Union in order to wire the money to his daughter in El Salvador to buy a house.

12. He had bought the truck, used, about two months before the seizure. It had 16,000 miles on it when bought.

13. Mr. Alas testified that he had taken four years to save the money at issue.

CONCLUSIONS OF LAW AND ANALYSIS

1. T.C.A. §53-11-451(a)(6)(A) authorizes the forfeiture of “[e]verything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989 . . . , all proceeds traceable to such an exchange, and all moneys . . . used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act.”

2. The money was seized, according to Officer Robins, as being either proceeds from a drug transaction or intended to make a drug transaction.

3. The latter theory has no basis whatsoever. There was no proof that either Mr. Zelaya or Mr. Alas had ever bought drugs in the past, or that they were on their way to buy drugs. If money could be seized under the facts here as money intended to buy drugs, then every person who has ever traveled with cash could have that money confiscated and forfeited.

4. Since no drugs were found in the truck or on Mr. Zelaya or Mr. Alas, the State's case as to the money being proceeds of a drug transaction is that a large amount of money was found, that much of it had traces of four illegal drugs on it, that a trace of methphetamines was found in the truck, and that a drug dog alerted to drugs on the money and in the truck, which dog was trained not to alert to drugs over three hours old.

5. This judge did not find Officer Mason's testimony, as to the drug dog, to be credible. This judge has been hearing drug cases such as this for 18 years and has never heard anyone testify that a drug dog can be trained to not alert to drugs that were not present over three hours ago. The very idea that a dog can, in effect, be taught to quantify is not reasonable.

6. Even if Officer Mason is correct, another explanation for the drug alert would be amounts for personal use. And the fact that the money was in envelopes would presumably keep the smell from dissipating and so provide another explanation for the drug alert, other than concluding that the money had to be in contact with drugs within the previous three hours of the seizure.

7. If the State's case is correct, then Mr. Zelaya and Mr. Alas were selling marijuana, and cocaine and methphetamines and heroine, all of which traces were found to be on the money. Under this rationale, the two would have to be drug dealers of major proportions; however, no drug paraphernalia or any drugs for resale were found in the truck. Evidently, under the State's theory, the police must have stopped Mr. Zelaya and Mr. Alas just after they had sold \$17,300 of drugs and so were out of every drug they had been selling.

8. Not only is the above scenario unlikely, it seems to present a problem why, if the two brothers were selling four illegal drugs, in the huge quantities according to the \$17,300 seized, only a trace amount of methphetamines was found in the truck. There was not even a

trace of other drugs. And it seems odd that, if the money was from drug sales, everyone had paid in \$100 dollar bills.

9. This case is very much on point to Goldsmith v. Roberts, 622 W.W.2d 438, (Tenn. App., 1981) *cert. denied*. In Goldsmith police officers seized a vehicle belonging to Goldsmith after they found \$873.00 on him along with illegal drugs. The car was seized on the basis that it had been used for the transportation of illegal drugs for resale or that the money was a product of a drug transaction. Goldsmith, at the time, was unemployed and the arresting vice officers recognized him from previous encounters. The Court stated:

If everyone who carried less than \$1,000.00 in cash in denominations from \$100.00 down in their pockets in a wadded-up fashion could be inferred to be guilty of some unknown and unreported criminal offense, our jails would be full of honest business and professional people There is no proof as to how Goldsmith came to have \$873.00 in his bib overalls, whether he came by it by honest or dishonest means. Id. at 440.

The Court continued:

In a proceeding to forfeit funds under the Drug Control Act, the burden of proof rests upon the state, which must establish by a preponderance of the evidence, or as the more probable conclusion, that the money to be forfeited was received in consideration for or in exchange for a controlled substance There is no substantial evidence that any part of the money seized from appellant was received by him in consideration for or in exchange for a controlled substance. Indeed there is no evidence that appellant ever sold a controlled substance or that he was ever convicted of doing so. Id at 441.

10. In Goldsmith, the Claimant did not even testify. Here Claimants Zelaya and Alas gave very credible explanations for the seized money. Many times their testimony was contradictory. The testimony was confusing as to who had saved the money and to whose daughter the money was being sent. But it also became obvious at the hearing that the cause of this was the language barrier and translation problems, not because they were lying.

11. There was absolutely no proof Claimants sold any drugs. That a trace of a drug was found in a used truck is not a surprise.

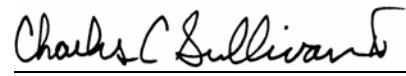
12. That Claimants had passed a Western Union where they could have stopped to wire the money is not inexplicable. They could have been going to a Western Union where they had done business before or which had a Spanish speaking clerk.

13. It is therefore **ordered** that the **seized money be returned** to Claimants.

This Order entered and effective this 21st day of June, 2007.

Robert Fellman
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 21st day of June, 2007.



Charles C. Sullivan II, Director
Administrative Procedures Division